NO. 87-2105

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STANLEY E. LINER, ET ALS
Petitioners

VS.

TERREBONNE PARISH SCHOOL BOARD, ET ALS
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas L. Wright
422 Lafayette Street
P. O. Box 6094
Houma, LA 70361
504-873-7766

Attorney for Petitioners

Pel Hughes Letter Service, 134 Carondelet St., New Orleans, LA (504) 523-2618

I. QUESTIONS PRESENTED FOR REVIEW

A writ of Certiorari is requested to review the actions of the Louisiana Courts outlined hereinafter. It is respectfully submitted that the EFFECT of the final judgment of these Courts resulted in the deprivation of Petitioners' basic constitutional rights of Equal Protection and Due Process. The two constitutional questions, presented as concisely as possible, are as follows:

1. Did the final judgment of the Louisiana courts violate the Petitioners' rights of Equal Protection of the Laws by holding the State of Louisiana, the adverse party, to a less stringent burden of proof than otherwise required by the law and jurisprudence applicable to this action for Declaratory Judgment?

2. Did the final judgment of the Louisiana courts, which was grounded in an unofficial, private resurvey of the Township in question which placed the various section lines in arbitrary locations, deprive the Petitioners of their property without due process of law?

II. LIST OF PARTIES

The PETITIONERS in this application are the plaintiffs in the original trial proceedings, Stanley E. Liner (who died during the course of these proceedings and whose heirs were substituted as parties), Collins A. Liner, Horace Liner, Henry P. Liner, Mrs. Claudia Liner Hebert, Mrs. Emmadel Liner Voisin, Collins Liner, Jr., Byron Liner and Claude Liner.

The Respondents in the matter are the defendants in the original trial proceedings, the State of Louisiana through the Terrebonne Parish School Board, The Kilroy Company of Texas, Inc., and Placid Oil Company.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STANLEY E. LINER, ET ALS, PETITIONERS

VERSUS

TERREBONNE PARISH SCHOOL BOARD , ET ALS,

RESPONDENTS

IV. REFERENCE TO OFFICIAL REPORTS

The opinion of the Louisiana Court of Appeal, First Circuit, dated December 22, 1987, Rehearing Denied, February 3, 1988, is found in 519 So. 2d 777. The Supreme Court denied timely application for Writ of Certiorari on March 25, 1988, reported in 521 So. 2d 1173.

V. GROUNDS FOR JURISDICTION

The final judgment of the Courts of Louisiana violate Petitioners' constitutionally guaranteed rights of Equal Protection of the Laws and deprive Petitioners of their property without Due Process of Law. The Judgment of the trial court, the 32nd

Judicial District Court dated May 15, 1986, was affirmed by the Louisiana Court of Appeal, First Circuit, by decision rendered December 22, 1987. Application for rehearing was denied, February 3, 1988. The Louisiana Supreme Court denied petition for Certiorari on March 25, 1988.

Petitioners rely on the provisions of 28 USCA §1257 (3) which confers on this Court jurisdiction to hear this application for Writ of Certiorari.

VI. PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioners cite the following as pertinent to this case, all of which are set forth verbatim in the appendix, attached hereto.

Amendments 5 and 14 to the Constitution of the United States.

Article 3654 of the Louisiana Code of Civil Procedure.

43 USCA §772.

VII. STATEMENT OF THE CASE

A. Introduction

A Writ of Certiorari is respectfully prayed for in this matter for the reason that the final judgment of the Courts of the

State of Louisiana results in the deprivation of Petitioners' constitutional rights of Equal Protection of the Laws; and a deprivation of Petitioners' property without Due Process of Law.

This matter arose as a suit for Declaratory Judgment, authorized and governed by the provisions of article 3654 of the Louisiana Code of Civil Procedure. Suit was filed to obtain a judicial determination as to the ownership of tracts of land claimed by Petitoners (the LINERS), on one hand, and by the State of Louisiana, through the Terrebonne Parish School Board (SCHOOL BOARD), on the other. Both claimants rely on valid, recorded title to property within the Township in question. The State of Louisiana, as trustee for the SCHOOL BOARD, is owner of Section 16 of this Township (20 South range 16 East, Southeast Louisiana Land District west of the Mississippi River). The LINERS hold title to a lot of ground created by a subdivision of Section 9 of the Township. Sections 9 and 16 are adjacent sections, thus, the properties called for in the titles of the rival claimants are in close proximity to each other. In this case the Trial Court had to determine whether the subject property fell within the property owned by the LINERS or that owned by the

SCHOOL BOARD. Article 3654 of the Louisiana Code of Civil Procedure sets forth the presumptions and burdens of proof applicable to this determination. It provides as follows:

> "When the issue of ownership of immovable property or of a real right therein is presented in an action for a declaratory judgment, or in a concursus, expropriation, or similar proceeding, or the issue of the ownership of funds deposited in the registry of the court and which belong to the owner of the immovable property or of the real right therein is so presented, the court shall render judgment in favor of the party:
>
> > "(1) Who would be entitled to the possession of the immovable property or real right therein in a possessory action, unless the adverse party proves that he has acquired ownership from a previous owner or by acquisitive prescription; or
> >
> > "(2) Who proves better title to the immovable property or real right therein, when neither party would be entitled to the possession of the immovable property or real right therein in a possesory action."

The unique aspect of this case, which causes the conflict, and hinders a practical resolution, arises from the Official Government Survey of the Township within which the subject property is situated. Township 20 South, Range 16 East is

located in the extreme lower portion of Terrebonne Parish (County), Louisiana, near the Gulf of Mexico. Except for the narrow alluvial ridge alongside Bayou DuLarge, which traverses the Township in a northeast to southwest direction, the area is generally open marshland, with no distinguishing topographical features for miles in each direction. The Government Survey of this Township was performed in 1838, a time when survey equipment and techniques were crude and primitive. Additionally, the harsh, forbidding environment of open marshland, without roads or access other than small boats, increased the likelihood that errors would be made in the survey of the Township. However, in this particular township the errors found in the Government Survey go far beyond simple misreading of a measuring tape or an angle. The evidence offered during the trial of this matter indicates a shortage across the Township of over 1,800 feet. Additionally, the original Government surveyor's traverse of the Bayou DuLarge, the only natural monument which exists to which the survey field notes can be anchored, contains such obvious and numerous errors as to make it impossible to retrace without wholesale random adjustments to the angles and distances reported in the original field notes. Numerous surveyors, over the past 50 years, have attempted to retrace

the field notes of the original Government Survey without success. To further complicate matters, the marshland has swallowed up all of the monuments set by the original Government Surveyor to mark the corners of the various sections within the township. In fact, not a single monument set by the original surveyor has ever been found. Consequently, since the erroneous traverse of the Bayou DuLarge renders it impossible to retrace the steps of the Government Surveyor; and since all monuments set in the field by the Government Surveyor have disappeared, it is impossible to locate the limits of section 16 and/or section 9 of the Township, where the titles of the adverse parties lie, with any degree of certainty.

The net legal effect of the erroneous Government Township Survey and the disappearance of the original monuments set to mark the section corners, is that the party given the burden of proving OWNERSHIP of the subject property simply cannot carry the burden of proof as defined by the applicable jurisprudence. It is the longstanding jurisprudence of the State of Louisiana that a party with the burden of proving OWNERSHIP, as in a petitory action, must prove not only valid legal TITLE to land, but also that the subject property falls within the limits of the land described in the title documents. Thus, title documents

which contain a vague or misleading or defective description of the property owned, cannot support a petitory action. Under the provisions of Article 3654 of the Louisiana Code of Civil Procedure, if one party proves possession of the subject property, the adverse party must prove that the subject property falls within the limits of the property it owns. If the SCHOOL BOARD has this burden, it must prove that the property falls within Section 16 of the Township. Similarly, if the burden is placed on the LINERS, they must prove that the property falls within Section 9 of the Township. To carry this burden of proof the party must prove the location of the section lines on the ground, in relation the subject property. However, since the markers are missing and the survey notes of the Government Survey cannot be accurately retraced on the ground, the party with the burden of proving OWNERSHIP cannot carry this essential element of its burden of proof.

The Trial Court, after considering the testimony and other evidence, and after thorough consideration of the extensive post-trial memoranda submitted by the various parties, rendered judgment in favor of the SCHOOL BOARD. The Trial Court determined that since there were numerous "disturbances" of possession by both claimants that neither party was entitled to

the presumption of ownership resulting from "possession" under the provisions of Article 3654(1). Instead, the Trial Court applied the provisions of Article 3654(2) which, if neither party is in "possession", mandates judgment in favor of the party which proves better title to the subject property.

The LINERS, relying on their unquestioned "possession" of the subject property, and cognizant of the impossibility of proving, with certainty, the actual location of the various section lines, offered no evidence attempting to locate the section lines. The SCHOOL BOARD, on the other hand, having no semblance of "possession" introduced abundant testimony by surveyors attempting to locate the limits of Section 16. The testimony of the experts offered by the SCHOOL BOARD consisted of a private, unofficial resurvey the entire township based not upon the information contained in the Government Field Notes, but rather upon a system of changes or adjustments in the original Field Notes so as to make the distances and bearing fit the preconceived notions of the experts as to where the section lines should be placed.

Since the SCHOOL BOARD offered efidence, albeit insufficient, to locate its property in relation to the Section lines, but the LINERS, relying on the "possession", did not, the Trial

Court rendered judgment in favor of the SCHOOL BOARD, more or less, by default.

On appeal, the LINERS demonstrated the utterly erroneous nature of the Trial Court's finding on the preliminary issue of possession. In light of the uncontraverted facts established by the evidence, the law and jurisprudence dictate a finding of "possession" in favor of the LINERS, and primae facie judgment of ownership under the provisions of Article 3654 (1) of the Louisiana Code of Civil Procedure. It was argued that application of the correct burden of proof on the SCHOOL BOARD would necessitate judgment in favor of the LINERS due to the SCHOOL BOARD's inability to prove the essential element of location of its property on the ground with the requisite certainty. It was further argued that the Trial Court's judgment, in not applying the law pertinent to the type of action involved violated the LINERS' constitutional rights of Equal Protection. It was further argued that the Court's accepting the evidence offered by the SCHOOL BOARD as the location of the section lines resulted in the location of the limits of Section 16 in an arbitrary location, bearing no relation to the position originally placed by the Official Government Surveyor. Since possession of land owned by the State can have no legal effect, the arbitrary location

of the limits of Section 16 deprived the LINERS of valuable property rights resulting from their longtime possession of the subject property, including the right of presumption of ownership, under Article 3654(1), without due process of law. (These constitutional arguments are found at pages 75 through 79 of the LINERS' original Appeal Brief.)

The Louisiana Court of Appeal First Circuit refused to properly consider the arguments set forth in Petitioners' Appeal. It refused to reverse the Trial Court's finding on possession, reasoning that even assuming possession in favor of the LINERS, the SCHOOL BOARD carried the burden of proving "ownership" of the subject property. This finding, however, ignored the jurisprudence cited in the LINERS' appellate brief, which requires, as a requisite to proof of ownership, that the property described in the title documents be susceptible of accurate location on the ground. Jurisprudence was ignored which held that a legal description tied to an erroneous survey, which cannot be accurately retraced, is insufficient to prevail in such an action. Instead, the Court of Appeal determined that the unofficial, private resurvey of the Township by the SCHOOL BOARD'S expert, based upon principles of proration and averaging of error, was to be accepted; and that location of the

SCHOOL BOARD's property in accordance with this unofficial survey was sufficient to carry its burden of proof.

An application for Writ of Certiorari was filed with the Louisiana Supreme Court after the Court of Appeal denied timely application for Rehearing. An entire section of the brief in support of this Application was devoted to the Constitutional issues of Equal Protection and Due Process (pages 53 through 57 of the Writ Application). It was argued that a "double standard" was applied in this case, apparently due to the identity of the State of Louisiana as the adverse claimant of the Petitioners' property. The applicable jurisprudence requiring proof of "ownership" was not strictly applied to the SCHOOL BOARD, thus, denying the LINERS of Equal Protection of the Law. It was also argued that the Court of Appeal's acceptance of the unofficial, private resurvey of the Township based on principles of proration and averaging of error, and ignoring the longtime peaceful possession of the LINERS and many others, resulted in a arbitrarily determined Section 16, which deprived the LINERS of the valuable property rights resulting from their longtime possession, without Due Process of Law.

The Louisiana Supreme Court denied the Writ Application, without written reasons, on March 25, 1988.

B. Issues Presented For Review

A Writ of Certiorari is requested to review the actions of the Louisiana Courts outlined above. It is respectfully submitted that the EFFECT of the final judgment of these Courts resulted in the deprivation of Petitioners' basic constitutional rights of Equal Protection and Due Process.

1. Despite the fact that Petitioners proved possession of the subject property, entitling them to primae facie judgment of ownership, unless the SCHOOL BOARD proved it was the owner of the subject property; the Louisiana Courts did not follow the applicable jurisprudence governing the elements of this burden of proof. The facts established by the evidence indicate that the property called for in the SCHOOL BOARD's title documents could not be located with any degree of certainty. In fact, the only way the SCHOOL BOARD could even attempt to locate its property was through an unofficial, private resurvey of the entire Township, based on principles of proration and averaging of errors, which was shown to have no relationship whatsoever to

the survey made by the official Government Surveyor in 1938 — which is the only "correct" location of the section lines, in the legal sense. Under the applicable jurisprudence, "ownership" could not be proved if the survey upon which the property description is based cannot be accurately retraced on the ground without "adjustments" to enable the survey to close. The SCHOOL BOARD was thus held to a lesser standard of proof than private litigants would be under the jurisprudence. Judgment rendered in favor of the SCHOOL BOARD grounded in this inferior proof, thus, deprived Petitioners of Equal Protection of the Laws.

2. The judgment of the Louisiana Courts which held that the SCHOOL BOARD proved the location of the limits of Section 16 of the Township deprives Petitioners of valuable property rights without Due Process of Law. The evidence upon which the judgment is based was, in fact, an unofficial, private resurvey of the Township and

was grounded in principles of proration and averaging of error. It completely ignored the longtime possession of Petitioners and others similarly situated, arbitrarily placing them in sections other than that to which their title documents correspond. As to Petitioners and others who find themselves in this arbitrarily determined 16th Section, the property rights acquired through longtime possession, with title, is forfeited. Since the provisions of 43 USCA §772, et. seq., governing Official Township Resurveys, prohibits upsetting vested rights previously established; a private, unofficial resurvey, which upsets possession rights, is a violation of Due Process when accepted by the Louisiana Courts as correct, and governing the result of this present dispute.

These questions will be addressed in separate sections of this Application, after a discussion of the Applicable Jurisprudence.

C. LAW AND JURISPRUDENCE APPLICABLE IN THIS MATTER

The LINERS' theory of recovery hinges upon the application of Article 3654(1) to the facts established by the evidence. The LINERS relied on their longtime physical corporeal possession of the subject property to give them the primae facie presumption of ownership, thus shifting the burden of proof to the SCHOOL BOARD to establish that the subject property actually would fall within Section 16 of the Township. The LINERS realized that once this burden was placed on the SCHOOL BOARD it could not be carried because of the disapearance of all survey markers set by the Government Surveyor in this Township, and the inability to retrace the field notes of the Government Survey on the ground. Thus, the SCHOOL BOARD is left with the unenviable position of having perfectly good title to land which cannot be accurately located. Thus, in a dispute with a rival claimant who is in physical corporeal possession of the subject property, the SCHOOL BOARD finds itself unable to prove, to the degree of certainty required by the law and jurisprudence, that the property so possessed is that to which the SCHOOL BOARD'S title refers.

The applicable law and jurisprudence is as follows:

The SCHOOL BOARD'S burden of proof imposed by Article 3654(1) in this case is the same as that of a party in a Petitory Action wherein the opposing party is in "possession" of the disputed property. The applicable statutory provisions and jurisprudence is as follows:

Article 3654 of the Code of Civil Procedure requires that the Court:

"...shall render judgment in favor of the party:

> "(1) Who would be entitled to the possession of the immovable property or real right therein in a possessory action, unless the adverse party proves that he has acquired ownership from a previous owner or by acquisitive prescription; or ..."

A party who must prove "ownership" under Article 3654 (1) must carry the same burden of proof as a plaintiff in a Petitory Action wherein the defendant is in possession. This is clearly illustrated by the case Tenneco v. Houston 364 So. 2nd 1056 (La. App., 2nd Cir., 1978) as follows:

> "The allocation of the burden of proof under La. C.C.P. Article 3654 is couched in terms of possession. If the court finds a party would be entitled to possession in a possessory action, then the adverse party has the burden of making out his title thereto. To complete this burden, the party must prove an unbroken chain of record title, or prescriptive title, which are sometimes referred to as "a title good [as] against the world." La. C.C.P. Article 3654 (1), Pure Oil Company v. Skinner 294 So. 2d 797 (La., 1974)"

This same issue was considered by the Louisiana Court of Appeal, Third Circuit, in Landry v. Dufour, 432 So. 2nd 1170 (La. App. 3rd Cir., 1983). There, the Court found the defendant proved "possession", and stated:

> "Under the circumstances plaintiffs' burden of proof under LSA-C.C.P. Article 3654 (1) was the same as in a Petitory Action. Pure Oil Company v. Skiner, 294 So. 2nd 797 (La. 1974)."

In order to prevail in a Petitory Action a party must establish ownership of the disputed property either by acquisitive prescription or by recorded title from a prior owner, [Article 3653 (1)]. If the party relies on title, he must prove valid title "as against the world" or not merely better than the party in possession. In order to obtain judgment in his favor, such party must rely on the strength of his own title and not on the weakness of

his adversary. See Hatter v. Sale, 188 So. 2nd 101 (La. App. 2nd Cir., 1966), Writs denied 249 LA 725, 190 So. 2nd 237, Certiorari denied 875 S. Ct. 1356, 386 U.S. 1011, 18 L.Ed. 440. See Also: Garrett v. Ernest, 369 So. 2nd 713, (LA App. 1st Cir., 1979). Writ denied 371 So. 2nd 1340; Schutten v. Orleans Parish Levee District, 320 So. 2nd 605 (La. App. 4th Cir., 1975). Writ denied 323 So. 2nd 806.

The jurisprudence requires not only proof of valid "title", but also that the property in dispute is the same property called for in title documents. The case of Smith v. Chappell, 148 So. 242, 177 LA 311 (La., 1933) clearly spells out this requirement. In that opinion, the court, after setting forth the requirement of proving valid record title, goes on to provide:

> "From this rule it follows, necessarily, that, when a plaintiff claims title to a certain lot of ground, he must show that his title covers the identical lot in controversy. Hemkin v. Brittain, supra, (12 Rob. 46), and Murray v. Boissier, 20 Mart. (O.S.) 293; Frere v. Derouen, 104 La. 777, 20 So. 330; Bayard v. Baldwin Lbr. Co., 157 La. 994, 103 So. 290; Ducre v. Milner, 165 La. 433, 434, 115 So. 646."

Consequently, so that such a determination can be made, the jurisprudence requires that the land called for in title docu-

ments be susceptible of accurate identification "on the ground." This element of the petitory burden of proof was mentioned in Nugent v. Franks 471 So. 2d 816 (La. App. 2nd Cir. 1985), wherein the Court's opinion stated the law as follows:

> "In a petitory action, the description in a deed must be such that the property intended to be conveyed can be located and identified. Baldwin v. Arkansas-Louisiana Pipe Line Co., 185 La. 1051, 171 So. 442 (1936); J. H. Jenkins Contractors, Inc. v. Farriel, 246 So. 2nd 340, 343 (La. App., 1st Cir., 1971). See also Vallee v. Richardson, 331 So. 2nd 201 (La. App., 3rd Cir., 1976)"

Our jurisprudence also provides that when a deed is partially defective, vague, misleading, or erroneous as to the description of the property intended to be conveyed, it will nevertheless be considered sufficient to maintain a petitory action provided the property intended to be conveyed can be ascertained with certainty with the aid of such extrinsic evidence as is permissable under the rules of evidence. This rule is clearly set forth in the decision in J. H. Jenkins Contractors, Inc. v. Farriel, 246 So. 2d 340 (La. App. 1st Cir., 1971) as follows:

> "In a petitory action, the description in a deed must be such that the property intended to be

> conveyed can be located and identified. As a general rule, the description must fully appear within the four corners of the instrument itself, or the deed should refer to some map, plat or deed as a part of the description so that the identity of the property conveyed is definite and cetain. Baldwin v. Arkansas-Louisiana Pipe Line Company, 185 La. 1051, 171 So. 442: Cupples v. Harris, above.
>
> "Where, in a petitory action, a deed is partialy defective, misleading or erroneous as to description, it is nevertheless susceptible of conveying provided the property intended to be transferred can be ascertained with certainty with the aid of such extrinsic evidence as is admissible under the rules of evidence. Snelling v. Adair, 196 La. 624, 199 So. 782; Harrill v. Pitts, 194 La. 123, 193 So. 562."

In the present case, the property called for the SCHOOL BOARD'S title documents can be correctly identified and located on the ground only by reference to the Official Government Survey of the Township. The problem in this particular case is that the location of the section lines as created by the Government Survey cannot be accurately located because of the disappearance, over time, of the monuments set by the Government Surveyor to mark the various section corners. Additionally, the field notes of the Official Government Survey cannot be

accurately retraced on the ground due to the erroneous traverse of the Bayou Dularge, the only natural monument to which the field notes can be anchored.

Township Surveys by the United States are given a special status in our property law. These surveys map the lands patented by the United States to individuals, and also establish the limits of the lands held for public use by the individual states. Consequently, these surveys and the Township Maps prepared from the survey notes, constitute the "official" sources whereby individually-owned properties can be located. The lines established by the Official Government Surveys cannot be changed or modified except through the procedures established by the Government of the United States. Even if it is demonstrated that the Official Government Survey of a Township contains errors, the Courts cannot change the position of markers and lines established by the Government Surveyors. The pertinent jurisprudence is clear and longstanding that wherever the Government Surveyor marks a line, "creates" the legal boundary — even if placed in an erroneous position. Stewart v. Boyd, 15 La. Ann. 171 (La. 1860); State v. Aucoin, 206 La. 786, 20 So. 2d 136 (La., 1945); State v. Ward, 314 So. 2d 383 (La. App., 3rd Cir., 1975) Writs refused 319 So. 2d 440 (La., 1975). Therefore the

position of markers set during an Official Government Survey establish the only correct position of the corner so marked — unless and until an Official Government Resurvey of the Township is authorized and made in accordance with the rules and regulations set forth in Title 43 of the United States Code. Official Government Resurveys of townships are not uncommon occurrences. The provisions of 43 USCA §772, et seq, however, provide that even an Official Resurvey authorized by the United States cannot upset vested rights of individuals affected by the relocation of section lines.

The accuracy of surveys of public lands before their disposition is committed exclusively to the executive branch of government, but in disputes with or between private owners after disposition by the government, the questions of where the lines run by such survey actually lie on the ground and whether any particular tract is on one side or the other of the line are factual and are always open to inquiry in the courts. See United States v. Hudspeth, 384 F. 2d 683 (9th Cir., 1967). According to 43 U.S.C.A. §752, concerning boundaries and contents of public lands, the original government survey as it was actually run on the ground is controlling. It does not matter that the boundary was incorrect as originally established. The fact that the inaccu-

racy of an original survey will set awry the shapes of sections and subdivisions does not affect the conclusiveness of the survey. See United States v. Citko 517 F. Supp. 233 (E.D. Wisconsin, 1981). Further, where an official survey of patented lands is in error as to boundaries, the courts will not attempt to resurvey the land nor correct possible errors in the surveyor's work. See Richard Grainger v. United States, 197 Ct. Cl. 1018 (1972).

The most pertinent jurisprudence found, involving a factual situation similar to that presented in the present case, arose in the Federal courts. The case of Shapleigh v. United Farms Co., 100 F. 2d 287 (5th Cir., 1938) involved determination of title to the banks of the Rio Grande River, where the river had changed course. As to the court stated,

> "In a suit in trespass to try title the burden is on the plaintiff to clearly establish that the land in dispute was comprehended within the description recited in his monuments of title, or proof that he has acquired title by operation of statute. He must recover on the strength of his own title, and not on the weakness of that of his adversary."

In Shapleigh, the private surveyor for the appellant attempted to resurvey the property and tried to follow the field notes of the original surveyor. The private surveyor testified:

> "If I had followed the original field notes as given in the deed the line would have been below the line involved in this suit, and in Mexico... If I had followed the original field notes it would never close ... I never followed on the ground the field notes as used in the confirmation deed from MacManus. I did not make any survey on the field notes ... If I take the original field notes on the deed from Bennett Davis to Shapleigh and others and run those field notes just as they are called for they will not meet. I couldn't follow the field notes from the deed from MacManus to Bennett Davis because I found some changes in the field. I used the field notes in the deed made by Soltans Rodrigues ... I made one survey, according to the field notes used in the deed from Bennett Davis to Shapleigh & Associates. In making that survey I twice departed from the calls in the field notes."

the court then stated:

> "These changes in the field notes being necessary to open and close the survey, this evidence upon which appellants must rely to recover, was wholly insufficient to sustain their burden of proof, to-wit, that the lands in question were embraced in their tract."

The law and jurisprudence cited above, considered in light of the facts of the present case, indicates that the effect of the final judgment of the Louisiana Courts have resulted in

deprivation of the Petitioners' constitutional rights of Equal Protection of the Laws and have deprived them of their property without Due Process of Law.

These constitutional questions will be addressed in the following sections of this application.

PART VIII. ARGUMENT

A. Equal Protection

In addition to the basic constitutional principles of Equal Protection, a special statute requires that the law governing this dispute be impartially applied even though one of the rival claimants is the State of Louisiana. LSA R.S. 13:5103 provides:

> "All procedural questions arising in suits or claims against the state, state agencies, or political subdivisions shall be determined, except as the contrary is specified in this part, in accordance with the rules or law applicable to suits between private parties."

Therefore, under the provisions of Article 3654 of the Louisiana Code of Civil Procedure, the LINERS' long time peaceful possession created a very important property "right". It gives them a presumption of ownership. In fact, if the jurisprudence applicable to the burden of proof imposed under Article

3654 (1) is applied to the SCHOOL BOARD in the present case, judgment will necessarily result in the LINERS' favor, for the reasons demonstrated hereinabove.

It is obvious that the Courts of Louisiana did not afford the LINERS equal protection of the laws. Had they done so, judgment would have been rendered in the LINERS' favor, declaring them owners of the subject property due to their proof of "possession" and the SCHOOL BOARD'S inability to carry the burden of proving ownership of the subject property. Had the applicable jurisprudence, cited in detail in the previous section of this application, been followed, the SCHOOL BOARD would have been held to the requirement of proving the location of the property called for in its title documents with certainty.

Since the law and jurisprudence provide that the only legal location of the limits of Section 16 of the Township is where the markers were set in the field by the Government Surveyor, this burden of proving location could have been carried by either one of two methods of proof. Either the SCHOOL BOARD could locate the actual markers set in the field by the original Government Surveyor, or it could retrace the survey field notes on the ground to reestablish where the markers were originally placed. Unfortunately, neither of these methods could be fol-

lowed, due to the peculiar facts of the present case. Instead the SCHOOL BOARD attempted to prove the location of the limits of Section 16 through a new, unofficial, private resurvey of the entire Township. While it is admitted that the expert who testified for the SCHOOL BOARD may have done the best job he could, under the circumstances, in attempting to solve the dilemma resulting from the lost monuments and obviously erroneous survey field notes; the fact remains that the section lines created by this unofficial resurvey bear no logical relation to the placement of the lines by the Original Government Survey. And since the location of the Section lines as set by the original Survey is the only location pertinent to the SCHOOL BOARD'S burden of proof, the work of the SCHOOL BOARD'S expert had no probative value, under the applicable jurisprudence.

As was pointed out in the Shapleigh case, cited above, when the survey field notes are departed from in an attempt to make "adjustments" in order to make them fit the topography, it is simply an indication that the legal "description" of the title deed is insufficient to accurately locate the property called for in the title documents. Not only are such "adjustments" impermissible, but the mere necessity of such adjustments are indicative of the failure of the title.

The actions of the Louisiana Courts in ignoring the pertinent, applicable jurisprudence constitutes manifest error of law. The effect of this error is the deprivation of the LINERS' basic constitutional rights of due process and equal protection of the laws. A "double standard" should not apply simply because the State is a party to this lawsuit or because a Government Township Survey is called into question. The same jurisprudential standards should be applied to the SCHOOL BOARD as would be applied to a private litigant. Under the peculiar and unique factual situation existing in this case, the SCHOOL BOARD simply cannot locate its property with the precision required by the jurisprudence. Whether this inability is due to an erroneous private survey or an erroneous Government Survey is of no material issue. Nor should the fact that a subdivision of the State is a party to this action cause any concern. With the exception of the imprescriptibility of State-owned lands, the general rules governing real actions apply even though the State is a party. This case does not involve the "loss" of State-owned land to private individuals by acquisitive prescription. This case instead presents a real action provided by law to resolve the conflicting claims of two parties to the same piece of land. Under

the procedural requirements of the applicable Code of Civil Procedure Article 3654 (1) the burden of proving ownership of the land in question was placed upon the SCHOOL BOARD. The evidence offered was simply insufficient, under the pertinent jurisprudence, to carry this burden of proof.

B. Due Process

The effect of the judgment of the Louisiana Courts has been the deprivation of the LINERS' property rights without Due Process of Law. This was the result of the acceptance by the Louisiana Courts of a private, unofficial resurvey of the Township, as controlling the outcome of this dispute. The section lines depicted by this survey, have no logical relation to the positions of lines reported by the Official Government Survey field notes. Additionally, it was shown that the location of the section corner marking the boundary between Sections 9 and 16, according to the resurvey, was not in the same location as that noted by the official survey field notes. Consequently, the resurvey accepted by the Louisiana Courts places the various section lines in completely arbitrary locations which have no relation to the positions of the lines set by the original Government Survey of the Township. As a result, the actions of the Louisiana Courts

have a far-reaching affect on the property rights of the LINERS and other possessing land under color of title, within this Township.

Not only the LINERS, but also their neighbors, have been in peaceful possession of property with title for over 100 years. Up and down Bayou Dularge are numerous landowners with valid recorded title originating from Francois Virguerie, who sold in accordance with the subdivision made by Sulakowski. These landowners, each with recorded title, have possessed their land peacefully for well over 30 years. Are their possessions in the correct places? No one know for certain. Their possessions, however, have been peaceful, in accordance with their titles, and in the "correct" relative positions called for in their titles. If their possessions overlap their "ideal" locations, any title problems will have long been quieted through possession and acquisitive prescription — except those who, like the LINERS, find themselves in an arbitrarily determined 16th Section!

It must be kept in mind that the subject property is primarily open marsh. It is completely indistinguishable from the surrounding land for miles in each direction. Although

claimed by the State, it is unlike other State-owned land which is easily recognizable by its nature — the seashore, the bank of a stream, and the like. Section 16 School lands exist only where marked by the Government Surveyor. If these markers can be found, or their location established through the information provided in the Government Survey fieldnotes, then the land is protected by the constitutional prohibitons against loss through adverse possession. A distinction must be made between the lands the State owns, and land it merely "claims" to own. Until land "claimed" is identified as State-owned it cannot be given the constitutional and jurisprudential protections from possession and claims of private ownership.

In the present case any attempt by the Courts to fix the location of the Section 16 boundaries must be based upon conclusive evidence of the correct positions of these lines. These boundaries will thereafter form a "line of demarcation" on one side of which the general rules of Louisiana property law apply; and on the other side of which these general rules are superceded by the constitutional prohibition against loss of State lands through possession and acquisitive prescription. It stands to reason, therefore, that if the Courts locate this "line of demarca-

tion" in an arbitrary location — one not clearly the same place as set by the original government surveyor — it will have the effect of depriving certain possessors of the valuable property rights attributable and resulting from their possession. Such arbitrary "state action" is unconstitutional because it deprives possession of property rights without due process of law. Paramount among these rights is the presumption of ownership, resulting from possession, in an action for Declaratory Judgment or Concursus, brought under the provisions of Article 3654 of the Code of Civil Procedure.

The Louisiana Courts unnecessarily tied the resolution of this case to a private, unofficial resurvey of the Township. This resurvey, accepted by the Courts as an accurate depiction of the various section lines within the township, upsets the longstanding peaceful possession of the LINERS and many other landowners with title, who now find themselves within an arbitrarily determined Section 16. If the Courts had determined that the Original Official Government Survey of the Township could not be retraced, judgment should have been rendered in favor of the LINERS in this particular case, since the SCHOOL BOARD was unable to accurately locate its property, as required

by the jurisprudence. Thereafter, an Official Government Resurvey of the Township could have been requested to prevent similar problems of proof in the future. However, even if an Official Resurvey of the Township would be undertaken, the property rights vested in good faith possessors under color of title, within the Township could not be upset by the Official Resurvey. The provisions of 43 USCA § 772 provide:

> "The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands, as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands so affected by such resurvey or retracement: Provided further, That not to exceed 20 per cent of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby." (emphasis added)

It must be kept in mind that in the present case, after the LINERS established possession of the subject property the

burden of proof shifted to the SCHOOL BOARD to prove the subject property fell within the limits of Section 16 of the Township. This burden of proof required proof of the location of the Section as marked by the Official Government Survey. Where the section lines would be marked in a resurvey is complete irrelevant to this burden of proof. However, as provided in the statute cited above, an Official resurvey of the Township cannot upset the vested rights of individuals affected by the relocation of section lines. In this case the Louisiana Courts have accepted, as determining the outcome of this lawsuit, an unofficial private resurvey which completely nullifies the effect of the LINERS' longstanding peaceful possession, which under the pertinent statutes, entitles them to judgment declaring them legal owners of the subject property. Contrary to the express provisions of the statute cited above, and in violation of the procedural rules of the State of Louisiana, the LINERS were thus deprived of their valuable property rights without Due Process of Law.

C. IMPORTANT QUESTION OF CONSTITUTIONAL LAW

A Writ of Certiorari should be granted in this case. As demonstrated hereinabove, the Judgment rendered and affirmed

by the Louisiana Courts is clearly contrary to the law and evidence. Additionally, the effect of this erroneous judgment is the violation of the Constitutionally guaranteed rights of Equal Protection of the Laws, and a deprivation of the valuable property rights, acquired by possession of the subject property, without Due Process of Law.

This case presents a serious and important legal issue which this Court should address. The issue is whether or not the constitutionally guaranteed rights of Equal Protection of the Laws and requirements of Due Process extend to individuals when involved in litigation against a State. Should a different set of principles govern a dispute between an individual and a State? The Courts of the State of Louisiana seem to feel so. In fact the effect of the final judgment rendered in this matter maintains such a "double standard". While this writer agrees that under certain circumstances principles of "sovereign immunity" must apply to protect the State and its resources from constant litigation, conflicts will always arise when the State is a neighbor to private landowners. The general property laws must be applied impatially when a conflict arises between the state and its neighboring private landowner. Otherwise, property located in proximity to State-owned lands would have no value. By

special provision in the Louisiana Consitution, state lands are already given special protection from being lost through adverse possession and acquisitive prescription. Thus, possession of state-owned lands can have no legal effect. However, in the present case a distinction must be made between land the State of Louisiana owns and land it merely "claims" to own. Until land "claimed" is identified as State-owned, it cannot be given the constitutional and jurisprudential protections from possession and claims of private ownership.

The present case presented the question of whether or not the land possessed by the LINERS was or was not State-owned land. Under the provisions of the applicable procedural statute, the burden of proving that the land was State-owned fell upon the SCHOOL BOARD. The issue was whether or not the evidence offered to prove the subject property was State-owned land was sufficient under the applicable law and jurisprudence. It was shown that, under the applicable jurisprudence, the evidence was insufficient to carry this burden of proof. However, in this case the Louisiana Courts simply ignored the jurisprudence which would have resulted in Judgment in favor

of the LINERS, and instead applied a less stringent burden of proof on the SCHOOL BOARD. Petitions for Rehearing by the Louisiana Court of Appeal and for Writ of Certiorari to the Louisiana Supreme Court, arguing the unconstitutionality of such action were denied.

Only this Honorable Court is available to rectify the injustices done to the Petitioners by the Courts of Louisiana. At issue here is much more than the homes and properties of the individual petitioners. At issue is more than the mineral wealth which has been unconscionably converted by the SCHOOL BOARD and the other defendants. At issue neither is the basic constitutional rights of individuals to be treated fairly and impartially by the Courts when involved in litigation against the Sovereignty.

On behalf of the Petitioners herein, the Liner family, whose homes and fortunes are otherwise wrongfully lost, it is

respectfully requested that this Court favorably consider this Application and grant a Writ of Certiorari to review the actions of the Louisiana Courts complained of herein.

THOMAS L. WRIGHT
422 Lafayette Street
P. O. Box 6094
Houma, LA 70361
504-873-7766
Attorney for Petitioners

IX. CERTIFICATE OF PROOF OF SERVICE

Pursuant to Sup. Ct. R. 28 and 46, on June 21, 1988, and on behalf of the Petitioner, I served three copies of this document on each party to the proceeding, and on all parties required to be served, by delivering it by mail in a wrapper, with first-class postage prepaid, which I deposited with the United States Postal Service, and which I addressed to:

John M. McCollam
Gordon, Arata, McCollam, Stuart and Duplantis
201 St. Charles Avenue, Suite 4000
New Orleans, LA 70170

Robert S. Rooth
Chaffe, McCall, Phillips, Toller and Sarpy
1100 Poydras Street, Suite 2300
New Orleans, LA 70163-2300

THOMAS L. WRIGHT

PART X. APPENDIX

1. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment Five, Constituion of the United States.

2. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment Fourteen, Section 1, Constitution of the United States.

3. "When the issue of ownership of immovable property or of a real right therein is presented in an action for a declaratory judgment, or in a concursus, expropriation, or similar proceeding, or the issue of the ownersnip of

funds deposited in the registry of the court and which belong to the owner of the immovable property or of the real right therein is so presented, the court shall render judgment in favor of the party:

> "(1) Who would be entitled to the possession of the immovable property or real right therein in a possessory action, unless the adverse party proves that he has acquired ownership from a previous owner or by acquisitive prescription; or
> "(2) Who proves better title to the immovable property or real right therein, when neithr party would be entitled to the possession of the immovable property or real right therein in a possessory action."

Louisiana Code of Civil Procedure Art. 3654

4. "The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands, as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands so affected by such resurvey or retracement: Provided further, That not to exceed 20 per cent of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby." (emphasis added)

43 USCA § 772

5.

STANLEY E. LINER ET AL	32ND JUDICIAL DISTRICT COURT
VERSUS NO. 64396	PARISH OF TERREBONNE
TERREBONNE PARISH BOARD ET AL	STATE OF LOUISIANA

JUDGMENT

This matter came on for trial on September 19th, 23rd and 24th, 1985, pursuant to previous fixing, there being present:

THOMAS L. WRIGHT and MICHAEL P. PELLEGRIN, attorneys for plaintiffs, Stanley E. Liner, Collins A. Liner, Horace Liner, Henry P. Liner, Mrs. Claudia Lienr Hebert and Mrs. Emmadel liner Voisin,

ROBERT S. ROOTH, CORINNE ANN MORRISON and JOHN N. KENNEDY, attorneys for defendant, Placid Oil Company,

ROBERT L. MORRIS, attorney for defendant, Kilroy Company of Texas, Inc.; and

JOHN M. McCOLLAM and ANDREW McCOLLAM, III, attorneys for defendant, Terrebonne Parish School Board,

The Court having considered the law, pleadings, evidence, arguments and memorandums of counsel, is of the opinion that there should be judgment in favor of defendants, Terrebonne Parish School Board, Kilroy Company of Texas, Inc. and Placid Oil Company, and against the plaintiffs, Stanley E. Liner, Collins A. Liner, Horace Liner, Henry P. Liner, Mrs. Claudia Liner Hebert and Mrs. Emmadel Liner Voisin; accordingly, for written reasons this day assigned,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, Terrebonne Parish School Board, Kilroy Company of Texas, Inc. and Placid Oil Company, and against the plaintiffs, Stanley E. Liner, Collins A. Liner, Horace Liner, Henry P. Liner, Mrs. Claudia Liner Hebert and Mrs. Emmadel Liner Voisin, dismissing plaintiffs' lawsuit, with prejudice, and at plaintiffs' cost;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the expert witness fees of William Clifford Smith, Dr. Terry Dantin and Kenneth Rembert be, and they are hereby fixed at the xum of TWO HUNDRED FIFTY AND NO/100 ($250.00) DOLLARS each, and taxed as cost.

JUDGMENT RENDERED, READ AND SIGNED in Chambers at Houma, Louisiana on this 15th day of May, 1986.

/s/ Wilmore J. Broussard, Jr.
District Judge

6.

STANLEY E. LINER ET AL	32ND JUDICIAL DISTRICT COURT
VERSUS NO. 64396	PARISH OF TERREBONNE
TERREBONNE PARISH BOARD ET AL	STATE OF LOUISIANA

REASONS FOR JUDGMENT

This lawsuit was filed by Stanley E. Liner, and some of his children, namely, Collins A. Liner, Horace Liner, Henry P. Liner, Mrs. Claudia Liner Hebert and Mrs. Emmadel Liner Voisin.

They seek a declaration from this court recognizing them

as owners of property which they occupy and for damages for the alleged wrongful removal of minerals from the property. This suit involved two nonadjacent tracts of land referred to as the "Henry Liner Tract" and the "Stanley Liner Tract". These tracts are shown on a map introduced into evidence as exhibit number "Smith-3".

The defendants are the Terrebone Parish School Board, who is the adverse claimant to the property, and Placid Oil Company and Kilroy Company of Texas, who are conducting drilling and production activities allegedly on the property.

The plaintiffs' property, hereinafter referred to as the Liner Tract, consists of a portion of Lots Numbers 21 and 22 of a plan of survey made by V. Sulakowski located in Section 9, Township 20 South, Range 16 East in Terrebonne Parish, Louisiana. The Liner Tract is located along Bayou Dularge and is bounded "below" (or South) "by School Land" (meaning Section 16).

The land encompassing the Liner Tract was originally acquired by Newton Boley from the United States Government by patent dated May 13, 1846 and recorded under entry number 4595 on December 27, 1847 of the records of Terrebonne Parish, Louisiana. Mr. Boley acquired Lots Numbers 1, 2, 3, 4, 5, 6, 7,

and 8 of Section 9, T-20-S, R-16-E (see exhibit number "Liner-Title 1").

These lots were acquired by Francois Viguerie at public auction of the Succession of Newton Boley on March 16, 1867 and recorded on March 18, 1867 under entry number 9383 of the records of Terrebonne Parish, Louisiana (see exhibit number "Liner-Title 2").

The property of Francois Viguerie was subdivided by a survey of V. Sulakowski. At this point the chain of title of the tracts diverges.

The "Stanley Liner Tract" originates out of the Viguerie property by a transfer from Viguerie to Joseph Billiot on February 21, 1871 of Lots 21 and 22 of the Sulakowski survey of Section 9, T-20-S, R-16-E. This document was recorded in the records of Terrebonne Parish, Louisiana under entry number 20/3897 on February 21, 1871 (see exhibit number "Liner-Title 3").

Joseph Billiot transferred Lots 21 and 22 to Xavier St. Martin on December 20, 1899. This document was recorded on the same date of sale under entry number 10028. This is the first document which lists the property as bounded "below by school lands" (see exhibit number "Liner-Title 4").

Xavier St. Martin transferred Lots 21 and 22 to Luke Thibodaux and Narcissi Thibodaux on January 22, 1900. This document was recorded on the date of sale under entry number 10111 1/2. It also showed the southern boundary as "school lands" (see exhibit number "Liner-Title 5").

Luke Thibodaux transferred an undivided 1/2 interest in Lots 21 and 22 to Benjamin Thibodaux on May 13, 1903. This document was recorded on May 30, 1903 under entry number 11546. It also shows the property bounded "below by land of school lands" (see exhibit number "Liner-Title 6"). This act also contained an act of partition alloting the upper half to Benjamin Thibodaux and the lower half to Narcisse Thibodaux.

Benjamin Thibodaux transferred his interest to the upper 1/2 of the property to Francois Tivet on Janury 27, 1908. This document was recorded on January 27, 1908 under entry number 1405 (see exhibit number "Liner-Title 7").

Francois Tivet transferred the upper 1/2 of the property to Nora Tivet on April 6, 1912 by act recorded on the same date under entry number 3734 (see exhibit number "Liner-Title 8").

Nora Tivet transferred the property to Joseph Burg on November 9, 1917 by act recorded on the same date under entry number 94/6311 (see exhibit number "Liner-Title 9").

Joseph Bourg transferred the property plaintiff Stanley Liner, on January 7, 1922 by act recorded on the same date under entry number 9040 (see exhibit number "Liner-Title 10"). The property description lists the property as being the upper 1/2 of Lots Numbers 21 and 22 of Section 9, T-20-S, R-16-E.

Stanley Liner subsequently sold portions of this property to his children, Collins Liner, Henry Liner, Claudia Liner, Horace Liner and Emmadel Liner Voisin (see exhibit numbers "Liner-Title 11-18").

The "Henry Liner Tract" originates out of the Viguerie property by a transfer from Francois viguerie to Joseph Billiot on February 23, 1871 of Lots 19 and 20 of the Sulakowski survey of Section 9, T-20-S, R-16-E (see exhibit number "Henry Liner-1").

Joseph Billiot transferred the property to Etienne C. Billot on September 27, 1884 (see exhibit number "Henry Liner-2").

Etienne Billiot transferred the property to Luke Thibodaux on March 4, 1895 (see exhibit number "Henry Liner-3").

Luke Thibodaux transferred the property to Henry Liner on March 20, 1897 (see exhibit number "Henry Liner-4").

Stanley Liner acquired the property through a judgment of possession in the Succession of Henry Liner and a partition of the heirs of Henry Liner (see exhibit numbers "Henry Liner-5 and 6").

There is no question that plaintiffs hold valid recorded title to property located in Section 9, T-20-S, R-26-E.

Plaintiffs maintain, in the alternative, that even if their actual possession does not lie in Section 9 they have obtained the property through thirty years acquisitive prescription.

The Ordinance of May 20, 1785 of the First Continental Congress mandates that sections "numbered sixteen" of every township are to be reserved and set aside for the use and benefit of the public schools and the school children of the respective townships. A copy of this ordinance was introduced into evidence as exhibit number "Smith-12". Sixteen section lands are therefore owned by the states, which hold them in trust for the school children of the state.

The government of the United States of America acquired title to all of the lands now encompassed within the political boundaries of the Parish of Terrebonne from the government of France by the treaty of Cessation of April 30, 1803. A copy of the treaty has been introduced into evidence as exhibit

number "Smith-13A".

Section Sixteen lands were transferred to the State of Louisiana, then the Territory of Orleans, by the Congress of the United States, by Acts of April 21, 1806 (2 Stat. 391, Ch. 39, Sec. 11) and of March 3, 1811 (2 Stat. 662, 665, Ch. 46, Sec. 10). Title to Section Sixteen was perfected in the state when the official government survey of the township was prepared by G. F. Connelly, Deputy Surveyor, and approved by the Surveyor General of Louisiana on May 21, 1842.

Therefore, all lands lying within Section Sixteen, T-20-S. R-16-E is vested with the State of Louisiana.

It is apparent to the Court that both parties hold valid recorded title to certain property. Plaintiffs' title is to property located in Section Nine, while the State's property is located in Section Sixteen.

Accordingly, the Court must decide which section the actual physical possession of plaintiffs lie in. In order to reach this determination both sides insist that the other party has the burden of proof.

In this regard the Court must initially determine the type of action before the Court and who bears the burden of proof.

Both parties are in agreement that this is not a possessory

action, since the plaintiffs have asserted their title in their pleadings. See paragraphs 2 through 12 of plaintiffs' original petition as well as plaintiffs' Supplemental and Amending Petition filed on September 25, 1981, and plaintiffs' Second Supplemental and Amending Petition filed on August 31, 1982.

Defendants content that plaintiffs have filed a petitory action under Article 3651 et seq. of the Code of Civil Procedure. However, Article 3651 of the Code of Civil Procedure defines a petitory action as "...one brought by a person who claims the ownership, but who is not in possession, of immovable property...".

In this case, it is undisputed that the plaintiffs and their ancestors in title have been in possession of the disputed property for a period of time in excess of one hundred years.

The Court is convinced that this is not a petitory action, but rather a suit for declaratory judgment. The burden of proof required in this case is set out in Article 3654 of the Code of Civil Procedure.

The statute provides for judgment in favor of whoever would be entitled to possession in a possessory action, unless the adverse party proves that he has acquired ownership from a

previous owner or by acquisitive prescription. In the event neither party would be entitled to possession in a possessory action then judgment must be rendered in favor of whichever party proves better title.

The Court must therefore determine if either party would be entitled to possession in a possessory action.

In order to maintain a possessory action Article 3658 of the Code of Civil Procedure required that: (1) the party be in possession of property at the time of a disturbance; (2) the party and his ancestors in title had quiet and uninterrupted possession of the property for more than one year prior to the disturbance; (3) a disturbance occurred; and (4) action was instituted within one year of the disturbance.

Using this criteria the Court is satisfied that neither party would be entitled to possession in a possessory action.

The Court is satisfied that both sides have exercised simultaneous and mutually exclusive acts of possession over the property for many years. The dispute between plaintiffs and the School Board is not of recent origin. Both parties have been aware of the other's claims at least since the 1930's when the dispute was briefly before the Court in the case of Liner et al v. Authement et al, Docket Number 10,022, introduced into evi-

dence as exhibit number "P-4".

Plaintiff's acts of possession include building their homes on the property, erecting fences over portions of the property, farming, cattle grazing, trapping, payment of property taxes (see exhibit number "P-1" and "P-1A"), granting right of ways (see exhibit number "P-11" and "P-12" to Louisiana Department of Highways and "P-13" to Placid), and the granting of mineral lease (see exhibit number "P-2").

The School Board's acts of possession includes the granting of right of ways (see exhibit number "TPSB-1", "TPSB-2" and "TPSB-3"), the execution of a surface lease for portions of property (see exhibit number "TPSB-4" and "TPSB-5"), the execution of mineral leases.

The Court is satisfied that both the plaintiffs and the School Board have exercised possession over the disputed property with the knowledge of each other for at least the last fifty years.

Additionally, plaintiffs could not maintain a possesory action against the State, even if they met all requirements necessary for a possessory action. A possessory action by a private litigant can only be maintained against the State where the object of possession is a private rather than a public thing.

Todd v. State of Louisiana through Department of Natural Resources 465 So. 2d 712 (La. S. Ct. 1985) (second rehearing).

Since Section Sixteen lands are owned by the State in trust for the benefit of public school children, the land is a public and not a private thing.

Therefore, the Court is convinced that neither party is entitled to possession in a possessory action and the burden of proof is on each party to prove a better title, in accordance with Article 3654 of the Code of Civil Procedure.

Plaintiffs maintain that the original government survey as it was actually run on the ground is controlling whether or not the boundary was correctly established. However, the passage of time has obliterated the original ground markings and neither party can establish the original boundary line between Sections Nine and Sixteen. In a case where the original boundaries have been lost or are unknown it is the duty of a surveyor to retrace prior government surveys. If the original corners and lines of the government surveys can be found, they must be followed. If the original corners and ines have been obliterated, natural objects and monuments are to be followed in identifying the prior surveys. Natural objects and monuments are more important than courses and distances in retracing old surveys and ascer-

taining the location of unknown and disputed lines. Cheramie v. Vegas, 194 So. 2d 189 (La. App. 1st Cir., 1967).

Defendants' expert surveyor, William Clifford Smith, prepared a resurvey of the boundary line between Sections Nine and Sixteen. All expert witnesses, including Dr. Terry Dantin and plaintiffs' own expert, Kenneth Rembert, were in agreement that Mr. Smith followed proper and accepted procedures in constructing his resurvey.

Plaintiffs' expert, Mr. Rembert, did not attempt to resurvey and reconstruct the section line between Sections Nine and Sixteen. He testified that if he had attempted such a resurvey, he did not believe his results would be significantly different from Smith's survey.

Dr. Dantin testified that the methods employed by Mr. Smith were in accord with the generally accepted methods of the profession and followed the Manual of Surveying Instructions and jurisprudential rules for reconstructing section lines.

Additionally, a survey performed by Mr. J. A. Lovell, in 1931 in connection a Court ordered survey in another case established the section line between Sections Nine and Sixteen in virtually the same position as that reconstructed by Mr. Smith (Lovell placed the line 10.8 feet further north). Copies of Mr.

Lovell's process verbal and survey plat were introduced as exhibit numbers "Smith-6" and "Smith-7".

The Smith survey places all but an inconsequential triangular corner of the Henry Liner Tract and all of the Stanley Liner Tract in Section Sixteen.

The Court is convinced that Mr. Smith has properly reconstructed the government survey and reestablished the north section line of Section Sixteen in accordance with acceptable professional and jurisprudential standards.

The Court is satisfied that the defendants have been able to meet their burden of proving that the disputed lands lie almost entirely within Section Sixteen.

There seems to be agreement by the parties that Section Sixteen land is not subject to acquisitive prescription.

Finally, the Court would like to note that some equities lie with the plaintiffs. They and their ancestors in title have lived on the property for over one hundred years. They have made their homes and their livelihood on the property. They have raised their families there. Additionally, while prescription is not available to them against the State, it may be available against them by those persons posessing the land called for in

plaintiffs' title. The facts of this case are indeed unfortunate and the Court has much sympathy for the plaintiffs and the plight they find themselves in. However, the Court has a duty to apply the law and cannot ignore the law in an attempt to reach an equitable solution.

The Court would like to point out that the School Board has never attempted to remove or evict plaintiffs and do not now do so. They simply have defended this lawsuit.

William Clifford Smith, Dr. Terry Dantin and Kenneth Rembert testified as expert witnesses on the trial on the merits. The Court will set their expert witness fees at $250.00 each.

For these reasons, the Court will render a decision in favor of defendants, Terrebonne Parish School Board, Kilroy Company of Texas, Inc. and Placid Oil Company, and against plaintiffs, Stanley E. Liner, Collins A. Liner, Horace Liner, Henry P. Liner, Mrs. Claudia Liner Hebert and Mrs. Emmadel Liner Voisin, dismissing plaintiffs' suit with prejudice and at plaintiffs' cost.

These reasons for judgment are rendered, read and signed in Chambers at Houma, Louisiana on this 15th day of May, 1986.

/s/ Wilmore J. Broussard, Jr.
District Judge.

7.

STANLEY E. LINER ET AL

VERSUS

TERREBONNE PARISH BOARD ET AL

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. CA 86 1341

ON APPEAL FROM THE THIRTY-SECOND JUDICIAL DISTRICT COURT FOR THE PARISH OF TERREBONNE, STATE OF LOUISIANA, NUMBER 64,396, THE HONORABLE WILMORE J. BROUSSARD, JR., JUDGE PRESIDING.

BEFORE: COVINGTON, SAVOIE AND LEBLANC, JJ.

LEBLANC, J.

This litigation involves a dispute regarding ownership of property located in Terrebonne Parish, Louisiana. Stanley E. Liner and other members of the Stanley Liner family filed suit

against the Terrebonne Parish School Board[1] seeking to be recognized as owners of the property in dispute and claiming damages for physical disturbance of their property and for the value of the minerals removed from beneath the property.

The Liners[2] claim ownership of two nonadjacent tracts of land locate on the left descending bank of Bayou DuLarge in Township 20 South, Range 16 East ("T20S-R16E") and claim that the two tracts of land in dispute are located within Section 9 of T20S-R16E.

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[1] Suit was also filed against Placid Oil Company and Kilroy Co. of Texas, Inc. Pursuant to oil and gas leases executed by Terrebonne Parish School Board, these companies have engaged in oil and gas production from the land located in Township 20 South, Range 16 East since 1975 and 1981, respectively, and production was ongoing as of the end of the trial in this matter on September 24, 1985.

[2] Stanley E. Liner died while this appeal was pending. His heirs, on their motion, were substituted for him in these proceedings.

The School Board also claims ownership of these two tracts of land. The School Board holds title to all land located within Section 16 of T20S-R16E, which lies directly south of Section 9, and claims that the tracts of land are located within Section 16.

The trial court determined that the defendants proved that the disputed land lies almost entirely within Section 16, except for an inconsequential piece of the land, and rendered judgment in favor of the defendants. Plaintiffs appeal.

Plaintiffs concede that if the property in dispute is determined to be located in Section 16, they have no ownership claim based on possession because Section 16 land is state land that cannot be acquired by acquisitive prescription.

The issues presented are:

1. For the purpose of determining whether plaintiffs or defendants bear the burden of proof and what the proper burden of proof is, should this suit be classified as a petitory action or an action for a declaratory judgment?
2. Assuming that plaintiffs have proven that they would prevail in a possessory action, have the defendants proven ownership of the property in dispute?

La. Code of Civ. P. art. 3651 provides that the petitory action is brought by someone who is not in possession of immovable property. Since it is uncontested that plaintiffs have built their homes and live on the property in question and have exercised various other acts of possession on the two tracts of land in dispute during the last fifty years, we find that this suit should be classified as an action for a declaratory judgment.

La. Code of Civ. P. art 3654 provided at the time this suit was filed:

> "When the issue of ownership of immovable property...is presented in an action for a declaratory judgment..., the court shall render judgment in favor of the party:
>
> (1) Who would be entitled to the possession of the immovable property or real right in a possessory action, unless the adverse party makes out his title thereto; or
>
> (2) Who proves better title to the immovable property or real right therein, when neither party would be entitled to the possession of the immovable property or real right therein in a possessory action."

Plaintiffs content that the evidence establishes that they would prevail in a possessory action and thus judgment should

be rendered in their favor unless defendants prove ownership of the land in dispute.

We determine that it is unnecessary to address whether the liners would prevail in a possessory action because we find that the School Board has proven that it owns the property in dispute based on the strength of its own title, except for a small part of the northern tract of land. The record clearly establishes that the School Board has traced its title to the land within Section 16 back to the sovereign. However, to establish title to the property in dispute, the School Board also has the burden of establishing that the land in dispute lies within Section 16. See, Vallee v. Richardson, 331 So. 2d 201 (La. App. 3d Cir.), writ denied, 337 So. 2d 523 (La. 1976). We find that the School Board has met this burden based on the testimony provided by defendants' two expert witnesses and plaintiffs' expert witness.

Defendants' expert land surveyor, William Clifford Smith, prepared a resurvey of the boundary line between Sections 9 and 16. In preparing this resurvey, Mr. William Smith reviewed the original government survey of T20S-R16S, which was prepared in 1838. The monuments set by the government surveyor, which marked the section corners in this township, no longer exist. In order to reestablish the section lines, Mr. William

Smith reviewed the private survey work of his father, T. Baker Smith, who performed survey work in the 1920's and 1930's.

T. Baker Smith's survey work and field notes indicate that he reestablished an original government corner, that being the east bank meander corner of Bayou DuLarge where it intersects the western section line of Section 20, T20S-R16E, based on the location of a tree that was marked as a witness tree by the original government surveyor. The government surveyor's field notes indicated where the corner was originally marked in reference to the witness tree. Based on the location of this reestablished government corner, three other original government corners in an adjacent township were established by T. Baker Smith. At this point, Mr. T. Baker Smith's examination of the government surveyor's field notes revealed errors in the government survey regarding certain measurements of distance. Working from the four reestablished government corners and placing emphasis on Bayou DuLarge as a natural monument, Mr. T. Baker Smith prorated the errors in the original government survey work across the township. Based on these calculations, T. Baker smith identified the boundary line between Section 9 and 16.

Mr. William Smith testified that he reviewed his father's

field notes and calculations and verified the actual position that his father established as the section line between Section 9 and 16. He testified that the survey work he performed was based on the Manual of Instructions for the Surveying of the Public Lands of the United States prepared by the U. S. Department of the Interior which sets forth rules for locating townships and section corners. He further testified that based on his reestablishment of Section 16, T20S-R16E, all of the land in dispute, except for a small triangular corner in the northwestern corner of the northern tract of land, was located in Section 16.

Plaintiffs content that the testimony of Mr. William Smith regarding the survey work prepared by other surveyors is inadmissible heresay testimony. We disagree.

In State v. Austin, 282 So. 2d 711, 712 (La. 1973), the court decided that the testimony of an expert in accident reconstruction should not be barred because his opinion was based on information supplied to him by others. Also, in State v. Fallon, 290 So. 2d 273, 291 (La. 1974) the supreme court held that it is permissible for doctors testifying as experts to rely upon reports of other doctors and nurses in forming their opinions. Also see, Barley v. State, Through State Dept. of Hwys., 463 So. 2d 689 (La. App. 4th Cir. 1985).

We find that Mr. William Smith's testimony is analogous to the situations presented in the above-cited jurisprudence and, therefore, his testimony should not be barred for the sole reason that his opinion was based, in part, on the work of other surveyors.

The defendants' other expert land surveyor, Dr. Terry Dantin, and plaintiffs' expert land surveyor, Mr. Kenneth Rembert, testified that Mr. William Smith's resurvey work was performed in accordance with the accepted survey procedures designated in the government manual. Mr. Rembert also testified that he did not attempt to construct a resurvey of this property but that if he had attempted such a resurvey he did not believe his results would be significantly different from Mr. Smith's survey.

Furthermore, we find that Mr. William Smith's survey techniques utilized in the reconstruction of the bounday line between Sections 9 and 16 are in accordance with the jurisprudential guidelines set forth in boundary actions. Although this particular case is not classified as an action to establish a boundary between two separate pieces of property, we find that the guidelines for the reconstruction of a line set forth in the boundary cases are applicable to this case, since the resolution

of this case depends on the location of a particular section line.

It is the duty of the surveyor to retrace prior government surveys in order to establish original section corners and lines. Bergeron v. Fournier, 426 So. 2d 658 (La. App. 1st Cir. 1982). Mr. William Smith's testimony and survey report clearly establish that his efforts were directed towards establishing the section corners and lines of the original government survey work of 1838 by examing the original government survey plat and field notes.

When Mr. Smith found that the government field notes contained conflicting information regarding the location of Bayou DuLarge within T20S-R16E and certain measurements of distance within the survey area, he prorated the error throughout the township, placing most emphasis on the information in the field notes regarding the location of Bayou DuLarge rather than the information regarding distances. This procedure is in accordance with the jurisprudential guidelines set forth in Cheramie v. Vegas, 194 So. 2d 189 (La. App. 1st Cir. 1966), writ refused, 250 La. 907, 19 So. 2d 918 (1967): ... if the original corners and lines have been obliterated, natural objects and monuments are to be followed in identifying the prior surveys.

It is well established that natural objects and monuments are more important than courses and distances in retracing old surveys and ascertaining the location of unknown and disputed lines. Also see, Barham v. Department of Highways, 431 So. 2d 899 (La. App. 2d Cir.), writ denied, 438 So. 2d 1111 (1983).

Furthermore, Smith's utilization of the technique of proration for the purpose of fitting together the sections of the township was appropriate. See, Board of Com'rs v. Mt. Forest Fur Farms, 178 La. 696, 152 So. 497 (1933), Smith v. Scarpengos, 56 So. 2d 757 (La. App. 2d Cir. 1952).

A survey predicated on sound surveying principles and procedures should be accepted unless the record shows it is incorrect. Porche v. Martin, 177 So. 2d 288 (La. App. 1st Cir. 1965); Barham, 431 So. 2d 899 at 903. In this case, plaintiffs have not presented any evidence to show that the Smith survey is not predicated on sound surveying principles and procedures. However, plaintiffs contend that the resurvey does not establish the precise section line of the original government survey, since the section line of the Smith survey was established based on a proration of the erros found in the government field notes. Plaintiffs argue that since there is no possible surveying method that can be used to reestablish the exact location of the original

government section line, defendants cannot prove ownership of the land in question.

Based on plaintiffs' argument, once original government survey markers have been lost and assuming any slight amount of error in the government survey work, it would be virtually impossible to prove ownership of property within the area of that survey. Plaintiffs would have this court place on the defendants a burden of proof that is impossible to overcome.

We find that the defendants need only prove the location of the property based upon accurate and competent evidence in accordance with applicable jurisprudential principles and accepted surveying principles. We find that defendants have met this burden of proof. To find otherwise, based on the facts of this case, would foster the instability of land titles.

Accordingly, we accept the location of the section line between Section 9 and 16, as affixed in Mr. William Smith's resurvey, and we find that defendants have proven ownership to all of the land in dispute, except for that portion of the northern

tract of land that lies within Section 9 of T20S-R16E.[3] We find that plaintiffs have proven ownership to this piece of land and that the trial court should have awarded judgment in favor of the plaintiffs with respect to this piece of property. However, based on the evidence in the record, we cannot prepare a property description that would specificaly identify this piece of property as mandated by La. Code of Civ. P. art. 2089, which provides, "All judgments and decrees which affect title to immovable property shall describe with particularly the immovable property affected." Therefore, we remand this case to the trial court for the sole purpose of rendering a judgment that will describe with particularity that part of the northern tract of land which lies within Section 9 of T20S-R16E.

The judgment of the trial court is affirmed in part and remanded.

Costs are to be paid by plaintiffs.

AFFIRMED IN PART AND REMANDED.

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[3] The portion of the northern tract of land that lies within Section 9 is colored in red on Exhibit Smith-3

8.

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

NO. CA/86/1341

STANLEY E. LINER, ET ALS

VERSUS

PARISH OF TERREBONNE

TERREBONNE PARISH SCHOOL BOARD, ET ALS

On Application For Rehearing.

Rehearing DENIED

/s/ Grover L. Covington
GROVER L. COVINGTON

/s/ Felix H. Savoie, Jr.
FELIX H. SAVOIE, JR.

/s/ Daniel W. LeBlanc
DANIEL W. LEBLANC

Judges

Filed Feb 3, 1988

/s/ Stanley P. Lemoine, Clerk
STANLEY LEMOINE, Clerk

9.

The Supreme Court of the State of Louisiana

STANLEY E. LINER, et al

VS.
NO. 88-C-0501

TERREBONNE PARISH SCHOOL
BOARD, et al

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IN RE: Liner, Stanley E.; Liner, Collins A.; Liner, Horace; Liner, Henry P.; Hebert, Claudia Liner; Voisin, Emmadel Liner; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA86 1341; Parish of Terrebonne 32nd Judicial District Court Div. "D" Number 64, 396

- - - -

March 25, 1988
Denied.

LFC
JAD
PFC
WFM
JLD
JCW
HTL

Supreme Court of Louisiana
March 25, 1988
/s/ Deputy Clerk of Court
For the Court